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Supreme Court, U.S.
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No. 97-1134

In the
Supreme Court of the United States
October Term, 1997

BAUGHANS, INC.; BLUE EARTH ENTERPRISES, INC.; KEVIN BORES; CHARLES F. BUCK; DAVIS PIZZA ENTERPRISES, INC.; DIANE A, DAVIS; FISHER PIZZA, INC.; JAMES B. FISHER, JR.; JRW PIZZA, INC.; LUGENT PIZZA, INC.; JOSEPH J. LUGENT; SCALE PIZZA, INC.; SPRING GARDEN PIZZA, INC.; BRAD L. WALKER; JAMES R. WOOD; INTERNATIONAL FRANCHISE ADVISORY COUNCIL, INC.,

Petitioners,

v.

DOMINO'S PIZZA, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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APP

ARGUMENT

Refuting a strawman argument rather than responding to the Franchisees' antitrust claims, Domino's says:

> Petitioners do not allege that, apart from its rights under the franchise agreements, DPI exercises any independent control or market power in any market for pizza ingredients such as cheese, sauce, dough or meats, or any other supply used in Domino's stores. . . . Instead, petitioners maintain that DPI's contractual rights reasonably to restrict ingredients purchases, approve suppliers and otherwise regulate franchisee store operations create "market power" and permit the definition of relevant antitrust markets limited just to Domino's franchisees. *See* Pet. App. 103-105.

Brief in Opposition 2-3. That assertion completely mischaracterizes the Franchisees' antitrust claims, in an obvious effort to obfuscate the split in circuits in franchisee antitrust cases.

The Franchisees' complaint alleged that Domino's used its 90% share of the $500,000 ingredients and supplies aftermarket — not its contractual approval prerogatives — to exclude the franchisee cooperative from becoming a competitor in that market. Domino's used predatory prices to induce franchisees into exclusive dealing arrangements to foreclose the cooperative's potential customers, and used its market power to coerce suppliers into requirements contracts, foreclosing the cooperative's potential suppliers. This anticompetitive behavior was in stark contrast to Domino's promise of an aftermarket policed by price competition, and Domino's change in policy occurred after the Franchisees' sunk costs locked them into their franchises.

In addition to misstating the Franchisees' antitrust claims, Domino's also misstates the holding in *United Farmers Agents*

Assoc. Inc. v. Farmers Insurance Exchange, 89 F.3d 233 (5th Cir. 1996). Domino's states: "In *United Farmers Agents*, the Fifth Circuit expressly recognized that an alleged 'lock in' of a **franchisee** arising out of a **franchise agreement** cannot form the basis for a relevant market under Kodak." Brief in Opposition 9 (emphasis supplied). But, *United Farmers Agents* involved insurance agents, not business format franchisees. The Fifth Circuit actually held that the ease with which insurance agents can sell insurance for other companies rendered *Kodak's* lock-in analysis inapplicable on the facts of that case. 89 F.3d at 238-39.

Domino's also misstates the holding in *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesselschaft*, 828 F.2d 1033 (4th Cir. 1987). Domino's states that, in *Metrix*, the Fourth Circuit was "limiting itself to the narrow question whether this Court's decision in *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936) (per curiam) established an automobile industry exception for tying claims under the Sherman Act." Brief in Opposition 15-16. However, the Fourth Circuit addressed not only that issue, but also the jury's rejection of Mercedes' proffered business justification for its tying arrangement. 828 F.2d at 1040-42. *Metrix*, 828 F.2d at 1040-43. The Fourth Circuit's decision directly conflicts with the Ninth Circuit's decision in *Mozart Co. v. Mercedes-Benz of N. Am.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988), that the aftermarket for replacement parts is not a cognizable antitrust market. Even Domino's concedes the Fourth Circuit decision involved "the same Mercedes-Benz policy at issue in *Mozart*." Brief in Opposition 15.

As the Petition demonstrates, there is a clear split in the Circuits in franchise tying cases.[1] *See* Petition 11-15. Indeed, this

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[1]*Compare Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesselschasft*, 828 F.2d 1033 (4th Cir. 1987); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Heatransfer Corp. v.*

case presents one of the most hotly debated issues in current antitrust commentary. *See* Petition 5 n.2. The Petition should be granted to resolve that debate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Volkswagenwerk A.G., 553 F.2d 964 (5th Cir. 1977); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1976) *with Valley Prods. Co., Inc. v. Landmark*, 128 F.3d 398 (6th Cir. 1997); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342 (9th Cir. 1987).